IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 230 of 2005
In
COMPANY APPLICATION No. 171 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

EXPORT IMPORT BANK OF INDIA - Applicant(s)
Versus
BIRLA VXL LIMITED - Respondent(s)

==========

Appearance :
MR MIHIR JOSHI, SENIOR ADVOCATE WITH MR DEVANG NANAVATI FOR NANAVATI & NANAVATI for Petitioner No(s).: 1.
MR MIHIR THAKORE & MR SN SOPARKAR, SENIOR ADVOCATES WITH MR SANDEEP SINGHI FOR SINGHI & CO for Respondent No(s).: 1.

==========

CORAM :	**HON'BLE MR.JUSTICE K.A.PUJ**

Date : 18/07/2005

ORAL JUDGMENT

1. The applicant, namely, Export Import Bank of India has taken out this Judge's Summons praying for recalling of the order dated 10.05.2005 passed in Company Application No. 171 of 2005 and for holding a fresh meeting of all classes of Companies, namely, Equity Shareholders, Preference Shareholders, Secured Creditors, Existing Lenders and Unsecured Creditors including the applicant and other like Creditors of the Company, under Section 391 (1) of the Companies Act, 1956 for the purpose of considering the proposed arrangement between the respondent – OCM (India) Ltd. and its Existing Lenders.

2. An affidavit in support of the Judge's Summons is filed by Shri Navin Gangawane, Chief Manager of the applicant Bank. Mr. Mihir Joshi, learned

Senior advocate appearing for the applicant Bank has submitted that though the prayer is made in the Judge's Summons in respect of recalling the order dated 10.05.2005 and holding of fresh meeting of all classes of Companies, namely, Equity Shareholders, Preference Shareholders, Secured Creditors, Existing Lenders and Unsecured Creditors including the applicant and other like Creditors of the Company, the applicant Bank is confining its prayer only to recalling of the order dated 10.05.2005 qua the meeting of Unsecured Creditors and holding a fresh meeting of Unsecured Creditors including the applicant and other like Creditors of the Company. He has further submitted that the Annual Report for the year ended on 31st March, 2004 of Masuzawa clearly reveals that it is indebted to the applicant for an amount of Rs.18,13,30,183/- plus the interest accrued and not provided for Financial year 2003-04 at Rs.3,08,26,000/-. The respondent has by way of Corporate Guarantee guaranteed this amount that

has been invoked by the applicant. The Annual Report of the respondent for the year ending 2004 reveals that for an amount of Rs.31,71,77,000/- it has extended guarantee/surety in respect of loan availed by the Masuzawa. However, there is a note appended to the balance sheet that these claims are not confirmed against the Company or accepted by it. Mr. Joshi has further submitted that as far as the claim of the applicant is concerned, this statement is incorrect. The respondent Company has deliberately not shown the applicant Bank as one of its Creditors and incorrectly included the same as one of the contingent liabilities even though the respondent is presently liable for outstanding loan availed by the borrower as the Corporate Guarantee was invoked by the applicant. The non-recording of debt due by the respondent to the applicant is contrary to Accounting Standard 4 (Contingencies And Events Occurring After the Balance Sheet Date) issued by the Institute of Chartered Accountants of India as the date of

preparation of balance sheet the debt of the respondent is not uncertain or contingent on occurrence or non-occurrence of any event as the liability of the respondent has crystalised in view of the invocation of Corporate Guarantee by the applicant. He has, therefore, submitted that at least going by the Accounting Practice of the respondent, the respondent should have mentioned about invocation of Corporate Guarantee and pendency of the Debt Recovery Proceedings as Notes to the Accounts. Even otherwise, treatment in the books of accounts of the respondent doesn't affect the right of the applicant.

3. Mr. Joshi has further submitted that the proposed Scheme of arrangement between the respondent, its Existing Lenders and Shareholders is contrary to the Deed of Undertaking executed in favour of the applicant dated 30.01.1999. Even otherwise, the proposed arrangement vitally and materially affects the interest of the applicant and the

applicant should have been called at the meeting to consider the proposed arrangement. A perusal of the proposed Scheme reveals that 60% of fixed assets of the respondent will be transferred to a new company i.e. OCM (India) Ltd. The Scheme further reveals that the current assets to the tune of Rs.5,287 Lacs, current liability to the tune of Rs.3,148 Lacs, secured loan to the tune of Rs.16,007 Lacs and Unsecured loan to the tune of Rs.234 Lacs out of total current assets of Rs.13,056/- Lacs, current liability of Rs.9,686 Lacs, Secured Loan of Rs.44,586/- Lacs and Unsecured loan of Rs.2,498/- Lacs will be transferred to the OCM India Limited. Apart from this, the Scheme envisages the reduction of Equity Capital by 80% and a further reduction of Preference Share Capital by 75%. A perusal of Schedule 1 to the Scheme further reveals that a contingent liability of Rs. 26 Lacs will be transferred to the new Company. Therefore, the remaining contingent liability (as per the books

of the respondent) will remain with the respondent. Mr. Joshi has, therefore, submitted that the above arrangement will impair the debt repayment capacity of the respondent as its capital is reduced substantially whereas its debt is not reduced in the same proportion. Therefore, the debt service capacity of the respondent is weakened by way of proposed arrangement.

4. Mr. Joshi has further submitted that the Scheme envisages that an Investment Division will be carved out wherein the Investment/Non-core assets will be transferred and Restructure Loan Amount of Rs.50 Crores will also be transferred. The Monitoring Committee will dispose of the Investment and Non-Core assets within a period of three years from the appointed date or such extended period as the Monitoring Committee and respondent will decide. The transfer of investment to the Investment Division also includes 30,00,000/- Equity Shares of borrower

i.e. Masuzawa Punjab Silk Ltd. This Scheme is clearly in violation of the Undertaking executed by the respondent on 30.01.1999 to the applicant and this has further effect on vitiating the rights of the applicant against the respondent. This transfer is admittedly in breach of the said undertaking given by the respondent.

5. Mr. Joshi has further submitted that the respondent has tried to overreach the process of law by way of proposed Scheme of Arrangement to defeat the very import of the order passed by Debts Recovery Tribunal, New Delhi. The respondent has by way of showing the contingent liability to the applicant has excluded the applicant from the process of arrangement which vitally and materially affects the applicant. He has, therefore, submitted that the respondent has obtained the order from this Court concealing the vital facts and has convened the meeting of the Unsecured Creditors without issuing any notice to

the applicant. There is all likelihood that there are many other creditors of the respondent like the applicant and they are excluded from the process of the proposed arrangement by showing their dues against the respondent as Contingent liability. In the interest of justice and fitness of things, the meeting of Unsecured Creditors on 25th June 2005 be declared to be an invalid meeting and fresh meeting of Unsecured Creditors including the applicant and like other Creditors of the respondent Company may be convened to transact the business of proposed arrangement of the respondent, its Existing Lenders, Shareholders and OCM (India) Ltd.

6. A copy of this application was served on the respondent Company through its Counsel. On 11.07.2005, Mr. Sandeep Singhi, learned advocate appearing for the respondent tendered reply. He has further submitted that fresh application is moved by the respondent Company and hence, both

the applications may be heard together and accordingly, the matter was adjourned to 13.07.2005.

7. An affidavit-in-reply is filed by Shri Girish Bhatia, Company Secretary of the respondent Company on 11.07.2005. Mr. Mihir Thakore, the learned Senior Counsel appearing for the Company submitted that realizing that no meeting of Unsecured Creditors of the applicant Company except the Unsecured Creditors of OCM Division, being transferred under the Scheme to OIL was required to be convened, the respondent Company has filed Company Application in this Court for convening the meeting of such Unsecured Creditors. In such circumstances, without admitting that the applicant and/or similarly situated persons are Unsecured Creditors or were required to be called at the meeting of Unsecured Creditors, he has submitted that the said issue is completely academic. The applicant by this application is

seeking to recall the order dated 10.05.2005 passed in Company Application No. 171 of 2005 and to convene fresh meetings of Equity Shareholders, Preference Shareholders, Secured Creditors, Existing Lenders and Unsecured Creditors. He has further submitted that the order dated 10.05.2005 is exhaustive itself. Pursuant to the said order, the meetings were convened and the Report of the Chairman has already been filed. In these circumstances, the question of recalling the order does not arise. He has further submitted that it is not the prerogative of the applicant, who has not proposed any Scheme, to seek directions for convening fresh meetings of all classes as prayed for. He has, therefore, submitted that the application deserves to be dismissed in limine.

8. The respondent Company has filed Company Application No. 243 of 2005 before this Court seeking direction for convening the meeting of Unsecured Creditors of OCM Division of the

applicant Company, being transferred to OCM (India) Limited for the purpose of considering and if thought fit, approving with or without modification, the Scheme of Arrangement between the applicant Company and its Existing Lenders, Creditors and Shareholders and OCM India Limited and its Shareholders.

9. An affidavit is filed by Shri Girish Bhatia, Company Secretary of the respondent Company wherein it is stated that the Scheme proposed does not envisage any compromise or arrangement with all the Unsecured Creditors of the applicant Company. Hence, there was no need for the applicant Company to convene the meeting of all the Unsecured Creditors. The Scheme envisages de-merger of the OCM Division of the applicant Company into OCM (India) Limited and for consideration of this de-merger, only a meeting of Unsecured Creditors of the OCM Division was required to be convened. It is, therefore, stated

that in Company Application No. 171 of 2005, the applicant Company applied for convening meeting of its Unsecured Creditors without appreciating that the Scheme does not envisage any Compromise or Arrangement with the Unsecured Creditors of the applicant Company other than the Unsecured Creditors of OCM Division, being transferred pursuant to the de-merger to OCM (India) Limited.

10. It is further stated that EXIM Bank or similarly situated persons are the Unsecured Creditors of the applicant Company. However, the meeting of Unsecured Creditors itself was erroneously convened and the only meeting which was required to be convened was of the Unsecured Creditors of OCM Division, being transferred to OCM (India) Limited. The alleged liability of EXIM Bank, irrespective of its status is not being transferred on de-merger of OCM Division to OCM (India) Limited. Under the Scheme, present and voting at the meeting held on 25.06.2005,

excluding the votes of other Unsecured Creditors. It was found that the requisite quorum of such Unsecured Creditors was not available. Hence, the respondent Company was constrained to approach this Court for convening the meeting of the Unsecured Creditors of OCM Division, being transferred to OCM (India) Limited.

11. In view of the affidavit filed in Company Application No. 230 of 2005 and in view of the averments made by the respondent Company in its Company Application No. 243 of 2005, it appears to the Court that the meeting of the Unsecured Creditors held on 25.06.2005 is abandoned by the Company and hence, the order passed by this Court on 10.05.2005 in so far as it relates to convening of the meeting of Unsecured Creditors stands revoked. The other part of the prayer of the applicant to convene the meeting of the Unsecured Creditors of the Company stands concluded in view of the finding given by this Court in Company

12. The present application is accordingly disposed of.

[K.A. PUJ, J.]

Savariya